United States Department of Labor
Employees' Compensation Appeals Board

J.B., Appellant	)	
and	)	**Docket No. 09-2229**
	)	**Issued: August 12, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Bellmawr, NJ, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 8, 2009 appellant, through her representative, filed a timely appeal from the June 1, 2009 merit decision of the Office of Workers' Compensation Programs, which denied continuing compensation for the accepted medical conditions. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case.

ISSUE

The issue is whether appellant has residuals of a right carpal tunnel syndrome or thoracic outlet syndrome causally related to her 1990 employment injury.

FACTUAL HISTORY

On May 14, 1990 appellant, then a 35-year-old distribution clerk, filed an occupational disease claim alleging that she sustained carpal tunnel syndrome in her right wrist as a result of constant repetitive motion in the performance of duty. The Office accepted her claim for right

carpal tunnel syndrome and right shoulder strain. Appellant received compensation for temporary total disability on the periodic rolls.[1]

Effective March 31, 1996, the Office terminated appellant's compensation for the accepted medical conditions. On January 31, 1997 an Office hearing representative affirmed the termination of benefits based on the weight of the medical evidence but found that a conflict had subsequently arisen on whether she continued to have right carpal tunnel syndrome causally related to the accepted work activities.[2]

After receiving the opinion of an impartial medical specialist, the Office denied continuing compensation. In a September 6, 2001 decision, the Board found that, as the Office had met its burden of proof to terminate compensation benefits, the burden shifted to appellant to establish that she had a condition or disability causally related to her employment injury.[3] The Board noted that the statement of accepted facts did not reflect the Office's acceptance of thoracic outlet syndrome and that the impartial medical specialist did not address that condition or the accepted right shoulder strain or prior electrodiagnostic studies.[4] The Board set aside the Office's denial of continuing compensation and remanded the case for a new impartial medical specialist.

On October 23, 2003 the Office referred appellant, together with the medical record and a statement of accepted facts, to Dr. George P. Glenn, Jr., a Board-certified orthopedic surgeon, for an impartial medical evaluation.[5] On November 4, 2003 Dr. Glenn reviewed appellant's file and the statement of accepted facts, which he stated showed a work-related right carpal tunnel syndrome, a right shoulder strain and a thoracic outlet syndrome. He reviewed various medical reports and clinical studies. Dr. Glenn related appellant's history and complaints and his findings on physical examination. Addressing the accepted right shoulder strain, he noted that the evidence-based literature would not support a claim for strain extending beyond a rather short, finite period of time. Appellant had a normal range of right shoulder motion without pain or tenderness. Give-away weakness was not secondary to pain and had no basis in organic pathology. Weakness was not associated with any discernible shoulder girdle atrophy. Appellant had no residual subjective complaints referable to the right shoulder. Dr. Glenn concluded that the injury appellant sustained to the right shoulder was resolved without residual.

[1] Appellant sustained an injury in the performance of duty on July 13, 1984 when a bundle of catalogs fell. The Office accepted that claim for right shoulder strain. OWCP File No. xxxxxx713.

[2] After an Office second opinion physician reported no objective findings, including a negative Tinel's and Phalen's sign at the wrist, appellant's physician reported a positive Tinel's sign and noted a median nerve neuropathy.

[3] Docket No. 00-1894 (issued September 6, 2001).

[4] The record on the whole supports that the Office did not accept thoracic outlet syndrome. The condition is parenthetically identified as an accepted medical condition on the Office's Form CA-800.

[5] On October 28, 2003 appellant's representative wrote to the Office to acknowledge his receipt of the referral letter.

Addressing the accepted thoracic outlet syndrome, Dr. Glenn noted that appellant had bilateral cervical ribs, a congenital condition frequently associated with fibrous band. As a consequence, the pathophysiology for outlet syndrome preexisted appellant's federal employment. The available history suggested that work activity, particularly overhead lifting and stretching, would have aggravated the underlying pathophysiologic factors, which would permit a thoracic outlet syndrome. Dr. Glenn considered the aggravation to be temporary. He explained there was no hard and fast rule to determine the exact time the aggravation ceased, but within a reasonable probability one could accept as the target date January 5, 1996, the date a second opinion physician reported no objective findings. Further, appellant's physicians reported maximum medical improvement by January 13, 1994 and again on April 6, 1994, as well as a plateau on January 7, 1997. As appellant had learned to adjust her activities so as not to precipitate any symptoms, Dr. Glenn concluded that aggravation from work factors had long since resolved, although the predisposition for thoracic outlet syndrome was still present in terms of the cervical ribs.

Addressing the accepted right carpal tunnel syndrome, Dr. Glenn noted that appellant currently showed none of the corroborating signs or symptoms of residuals. The Tinel's sign response did not produce a characteristic distribution. The Phalen's tests were normal. There was no evidence of thenar muscle weakness or atrophy. There was no median nerve sensory deficit, and the electrodiagnostics performed in October 2001 were normal. Dr. Glenn concluded that appellant therefore showed no evidence of any residual right carpal tunnel syndrome.

On September 23, 2004 Dr. Glenn reviewed EMG and nerve conduction studies obtained on December 11, 2003. He found that the ulnar slowing with absence of denervation was not part of appellant's clinical picture, an incidental finding of virtually no significance. Dr. Glenn added that the reported absence of radiculopathy or plexopathy further substantiated his opinion from November 4, 2003.

In a decision dated October 6, 2008, the Office denied continuing compensation. It found that Dr. Glenn's opinion represented the weight of the medical evidence and established no residuals of the accepted conditions.

In a decision dated June 1, 2006, an Office hearing representative affirmed. He found that Dr. Glenn's reports were sufficient to establish that all injury-related conditions had resolved.

On appeal, appellant's representative contends that the Office failed to notify him of the referral to Dr. Glenn, which affected appellant's ability to challenge the referee selection. He argued there is no proof that the Office selected Dr. Glenn from the Physicians Directory System (PDS); that Dr. Glenn's opinion is tainted because he obtained EMG testing from someone who had previously performed EMG testing on appellant; and the statement of accepted facts provided to Dr. Glenn did not include thoracic outlet syndrome as an accepted condition. Appellant's representative adds there is no indication in Dr. Glenn's report that he was provided with the statement of accepted facts. He argues that Dr. Glenn made positive findings on examination, including a blunting sensation in both hands, weakness in the hands and arms, sensory deficit from the right elbow to the wrist and further blunting sensation half way up the right wrist. Further, appellant's representative argues that Dr. Glenn reported appellant's

thoracic outlet syndrome to be preexisting, contrary to the Office's acceptance of the condition as a work injury.

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.[6] Where the Office meets its burden of proof to terminate compensation benefits, the burden is on the claimant to establish that any subsequent disability is causally related to the accepted employment injury.[7]

If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[8] When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[9]

ANALYSIS

To resolve the conflict on whether appellant continued have residuals of an employment-related right carpal tunnel syndrome or thoracic outlet syndrome,[10] the Office properly referred her to Dr. Glenn, a Board-certified orthopedic surgeon, for an impartial medical evaluation. It provided Dr. Glenn with appellant's medical record and a statement of accepted facts so he could base his opinion on a proper factual and medical foundation. Dr. Glenn demonstrated his familiarity with the case by relating appellant's history and reviewing her medical reports and clinical studies.

After examining appellant and describing her complaints, Dr. Glenn concluded that she no longer had residuals from a right carpal tunnel syndrome or thoracic outlet syndrome causally related to her federal employment. His opinion was clear and unequivocal. Dr. Glenn supported his opinion with medical rationale. As for carpal tunnel syndrome, appellant showed none of the signs or symptoms of residuals and electrodiagnostics in October 2001 were normal. As for thoracic outlet syndrome, Dr. Glenn explained that appellant had bilateral cervical ribs, a congenital condition frequently associated with fibrous band, which served as a preexisting

[6] 5 U.S.C. § 8102(a).

[7] *Maurice E. King*, 6 ECAB 35 (1953); *Wentworth M. Murray*, 7 ECAB 570 (1955) (after a termination of compensation payments, warranted on the basis of the medical evidence, the burden shifts to the claimant to show by the weight of the reliable, probative and substantial evidence that, for the period for which he claims compensation, he had a disability causally related to the employment resulting in a loss of wage-earning capacity).

[8] 5 U.S.C. § 8123(a).

[9] *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

[10] There is no conflict on the accepted right shoulder strain.

pathophysiology for outlet syndrome. He believed the available history of work activity suggested an aggravation of this underlying pathophysiology, which permitted thoracic outlet syndrome; but Dr. Glenn considered the aggravation to be temporary. Appellant learned to adjust her activities so as not to precipitate any symptoms her physicians had reported maximum medical improvement in the mid 1990s and a second opinion physician reported no objective findings in 1996. While appellant continued to have a congenital predisposition for thoracic outlet syndrome, the aggravation caused by work activity had resolved. Dr. Glenn reported that the EMG and nerve conduction studies obtained on December 11, 2003, which showed an absence of radiculopathy, further substantiated his opinion.

The Board finds that Dr. Glenn's opinion is based on a proper background and is sufficiently well rationalized that it must be given special weight. As the weight of the medical opinion evidence establishes that appellant no longer suffers from a right carpal tunnel syndrome or thoracic outlet syndrome causally related to her 1990 employment injury, the Board finds that appellant has not met her burden to show that she is entitled to continuing compensation. The Board will affirm the Office's June 1, 2009 decision.

Counsel contends that the Office failed to notify him of the referral to Dr. Glenn, but the record shows that he acknowledged receipt of the referral letter by October 28, 2003, a week before the scheduled examination. The fact that the Office did not send the referral letter directly to the representative is therefore harmless error.[11] Appellant's representative expressed no objection to Dr. Glenn's selection at that time and his current objection is untimely.[12] Moreover, the record establishes that the Office referred appellant to Dr. Glenn through the PDS appointment schedule.

Physicians previously associated with a claimant may not serve as impartial medical specialists.[13] Counsel cites no authority to support his assertion that an impartial medical specialist may not obtain a diagnostic study, such as an EMG, from a physician who previously tested a claimant. Appellant's representative does not explain how this would undermine the appearance of impartiality. It is the responsibility of the medical referee to explain how any such testing pertains to the findings on examination.

Although the record does not contain the statement of accepted facts sent to Dr. Glenn, he noted more than once that the statement of accepted facts reflected the Office's acceptance of thoracic outlet syndrome. He understood the medical condition to be employment related. There

[11] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.0500.4.d (May 2003) (the Office will notify the claimant and the representative); *id*., Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.0810.14.b (July 2000) (the claimant and representative, if any, must be notified in writing of the name and address of the physician to whom he or she is being referred, as well as the date and time of the appointment); *id*., Part 2 -- Claims, *Communications*, Chapter 2.0300.4.3 (February 2000) (where the employee has an attorney or other legal representative, the original of any letter to the claimant should be sent to that person, with a copy to the claimant).

[12] *See M.A.*, 59 ECAB ___ (Docket No. 07-1344, issued February 19, 2008) (finding that the claimant's objection, made 25 days before the scheduled examination by the impartial medical specialist, was timely).

[13] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.0500.4.b(3) (May 2003).

is no factual basis for the assertion that that statement of accepted facts did not include thoracic outlet syndrome as an accepted condition.

As for the blunting sensation in appellant's hands, Dr. Glenn explained that this obviously did not follow a dermatomal distribution. He did not report a positive Tinel's sign for median nerve compression. From a strength perspective, Dr. Glenn reported that appellant demonstrated complete give away weakness while acknowledging she was not experiencing any pain. He reported inconsistency in her response to examination of the ulnar nerve in the cubital groove. Dr. Glenn explained that grip strength testing was considered invalid because of the absence of a characteristic bell-shaped curve.

Dr. Glenn did not report that appellant's thoracic outlet syndrome was preexisting, as asserted. He reported that appellant had a congenital pathophysiology of the cervical ribs that predisposed her to aggravations that would permit thoracic outlet syndrome. Dr. Glenn reported that her work activities appeared to have caused such an aggravation but any such aggravation was temporary and had ceased. The report of Dr. Glenn establishes that appellant no longer had an employment-related aggravation. The congenital pathophysiology, however, remains.[14]

CONCLUSION

The Board finds that appellant has not met her burden to establish that she continues to suffer from a right carpal tunnel syndrome or thoracic outlet syndrome causally related to her 1990 employment injury. The weight of the medical opinion evidence establishes that her employment-related medical conditions have resolved.

[14] When an aggravation is temporary and leaves no permanent residuals, compensation is not payable for periods after the aggravation has ceased. *See Raymond W. Behrens*, 50 ECAB 221 (1999).

ORDER

IT IS HEREBY ORDERED THAT the June 1, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 12, 2010
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board